Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 1146 Orig 33.

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN.

Notice of Motion, Motion and Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

The Evening Post Job Printing House, New York.

Supreme Court of the United States. 1

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN.

October Term,
1898.

No.

Notice of Motion.

To ALEXANDER NIELSEN, the above named defendant: 2

Please take notice that on Monday, February 20, 1899, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of *certiorari*, of which motion a copy is annexed, will be submitted to the Supreme Court of the United States at the City of Washington, D. C., for the decision of the Court thereon.

In support of said motion a petition and a brief will also be presented to the Court. A copy of the petition and of the brief are herewith served upon you.

Respectfully,
JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner. 3

New York, February 6, 1899.

Due service of the foregoing notice of motion in the above cause is hereby admitted this 11th day of February, 1899.

Alexander Nielsen
Defendant.
by Edward Kaufmann
his Attorneys
and by Louis A. Kaeguen
his Counsel

4 SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER, Petitioner, vs. ALEXANDER NIELSEN.	October Term, 1898. No.

Motion.

And now comes Emilie Saxlehner, the above named petitioner, by Joseph H. Choate, Arthur v. Briesen and Antonio Knauth, her attorneys and counsel, and moves this Honorable Court for a writ
5 of *certiorari* directed to the Honorable the Judges of the United States Circuit Court of Appeals, within and for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all proceedings by them had in the suit lately before them, wherein this petitioner was appellant and said Alexander Nielsen was appellee and appellant.

The matter involved herein relates to the question of trade-mark rights of the petitioner in and to the name "Hunyadi" and a red and blue label used in connection therewith upon complainant's bitter water, called "Hunyadi Janos." Your petitioner's right to said trade-mark and
6 label has been held forfeited by petitioner's laches by the United States Circuit Court of Appeals for the Second Judicial Circuit, which has ordered the petitioner's bill of complaint in the present case to be dismissed.

EMILIE SAXLEHNER,
Petitioner.

By JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Her Attorneys and Counsel.

Due service of the foregoing motion is hereby admitted this 11th day of February, 1899.

Alexander Nielsen
Defendant.
by Edward Kaufmann
his attorney
and by Louis C. Raegener
his Counsel

SUPREME COURT OF THE UNITED STATES, 7

OCTOBER TERM, 1898.

No.

EMILIE SAXLEHNER, Petitioner,
In re. Petition for a writ of *certiorari* requiring the Circuit Court of Appeals in and for the Second Circuit to certify to the Supreme Court, for review and determination, the case of EMILIE SAXLEHNER,
Complainant and Appellant, 8

vs.

ALEXANDER NIELSEN,
Defendant and Appellant.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Emilie Saxlehner respectfully 9 shows:

FIRST.—That petitioner is a subject of the King of Hungary, and resides at Budapest, in the Kingdom of Hungary, and the defendant, Alexander Nielsen, is a resident and a citizen of the State of New York.

SECOND.—That the value of the matter in dispute in the above entitled cause, as appears by the bill of complaint therein, exclusive of interest and costs, exceeds the sum of two thousand dollars, and there is involved in said cause the validity or in-

10 validity of petitioner's trade-mark "Hunyadi" for bitter water and that of the label used by her, upon which several hundred thousand dollars have been spent for advertising in the course of more than thirty years, and which are of very large value to petitioner in her business.

THIRD.—That this suit was brought to restrain the defendant from infringement upon petitioner's trade-mark rights in the name "Hunyadi," and also from selling bitter waters bearing colorable and fraudulent imitations of the red and blue label used by petitioner in connection with said name "Hunyadi" on her bitter water called "Hunyadi Janos."

11

FOURTH.—That the undisputed facts relating to the adoption and use of petitioner's trade-mark and label may be shortly summarized as follows:

Andreas Saxlehner, your petitioner's husband and predecessor in business, now deceased, adopted the arbitrary and fanciful name, "Hunyadi Janos," for the bitter water of his springs at Budapest, Hungary, more than thirty years ago, and the same has since then been continuously used by him and your petitioner as a trade-mark in all civilized countries. The water was introduced into the United States about 1870, and has been continuously on sale in this country since said year. Every since its introduc-
12 tion it obtained the short name "Hunyadi Water" in this country, and is still sold and purchased under that name. The name "Hunyadi" was registered in the United States Patent Office by Andreas Saxlehner in the year 1887 as his trade-mark for bitter waters.

Since 1876 complainant's "Hunyadi" water has been sold in this country under a red and blue label bearing the name of the Apollinaris Company, Limited, Sole Exporters, which label was used until March, 1896. The Apollinaris Company was by contract the only party to which Saxlehner and complainant sold said "Hunyadi Janos" bitter

water for resale in this country, and when this contract ended in March, 1896, petitioner continued the business by selling the water in this country directly and using substantially the same label with slight modifications. A copy of the label used on the water sold to the Apollinaris Company, Limited, is hereto attached and marked "Exhibit A," and a copy of the label used by petitioner after the termination of said contract is also hereto attached, marked "Exhibit B." 13

Complainant's business amounts to about six million bottles per year of such water which she sells to all countries in the world from Hungary.

Since 1888 several other Hungarian bitter waters were imported bearing red and blue labels and the name "Hunyadi" in connection with some other name, every one of these labels being made in close imitation of Saxlehner's blue and red label. All these were sold in this country as "Hunyadi Water" with exception of those which had not the name "Hunyadi" on the label. Other Hungarian bitter waters have continued to be imported under their own labels and names, and these were not sold as or called "Hunyadi." The various waters sold under imitations of petitioner's name and label had no connection with one another either geographically or in quality or otherwise. 14

Until 1890 Saxlehner enjoyed no protection for the name "Hunyadi" or for *colorable* imitations of his label in Hungary, by reason of a lack of statutes upon the subject. He had repeatedly endeavored to obtain relief in Hungary against the imitators of his name and label, but without success, although he was by many years the first to adopt and use the name and label. He died in 1889. In 1890 a statute was passed in Hungary enabling the petitioner to sue imitators of her label, and in 1891 she commenced a series of litigations against all imitators of her label in Hungary, which were numerous. These litigations came to a successful termination in 1894 and 1895, when she succeeded in having all the imi- 15

16 tating labels canceled from the Hungarian Register of Trade-marks. The Statute of 1890, however, did not make provision for the registration of mere words or names as trade-marks, and petitioner therefore had no relief in court in Hungary against the use of the name "Hunyadi" alone or in connection with other words, such as "Lajos," until 1895, when another remedial statute was passed in Hungary permitting such relief. She immediately instituted new suits against the same persons against whom she had obtained the decrees canceling the imitating labels, and in October, 1896, obtained final decrees establishing her exclusive right to the name "Hunyadi" in Hungary for bitter-waters and can-
17 celing all the opposing trade marks employing that name in some connection or other. All these opposing marks were found to have been fraudulently contrived. Among the parties sued by petitioner in Hungary and against whom she obtained the relief described above in the years 1894 and 1896, was one Louis Schmidthauer, who furnishes the "Hunyady Lajos" water to the defendant. The defendant has for several years (it seems since about 1894) sold Hungarian bitter water under a red and blue label which is a fraudulent imitation of petitioner's label, bearing the name "Hunyady Lajos" and also the name "Schmidthauer Lajos" (meaning Louis Schmidthauer), and
18 stating that the defendant Alexander Nielsen is the sole agent for the United States and Canada. A copy of defendant's label is hereto attached, marked "Exhibit C."

In March, 1896, when the contract of the Apollinaris Company terminated petitioner also sued the Apollinaris Company in the Court of Chancery of England for an illegal use of the name "Hunyadi" upon a bitter water then introduced by that company under the name of a "New Hunyadi," and in the early part of the year 1897 obtained a final decree enjoining it from the use of the name "Hunyadi." Petitioner also brought in 1896 a suit

against Graef & Company, agents of the Apollinaris 19
Company in this country, which was settled by a voluntary abandonment of the use of the name "New Hunyadi" by said agents.

In October, 1896, when her rights had been finally recognized and established in Hungary, petitioner gave notice to all infringers in the United States, including the defendant, to stop further infringements, and a few months thereafter brought the present suit.

FIFTH.—The water which the defendant sells under the name "Hunyady Lajos" was first drawn from a spring at Nagy Igmand, in Hungary, and afterwards from a spring situated at Kocs, in Hun- 20
gary, the latter place being at a considerable distance from the former. Louis Schmidthauer sold this water in Hungary under a label closely simulating the red and white label used by petitioner in Hungary, and when exporting the said water to this country used the simulating red and blue label here. Schmidthauer is neither allowed to use the name "Hunyadi" nor a simulating label in Hungary now.

SIXTH.—The undisputed evidence showed that to physicians and the consuming public the name "Hunyadi" on bitter-water always meant and still means in the United States petitioner's "Hunyadi 21
Janos" water, and such name has not become generic for Hungarian bitter-waters, other such waters continuing to be imported and sold under other labels and names and not called "Hunyadi."

SEVENTH.—Petitioner's red and blue label bearing the name "Hunyadi Janos" was duly registered in the Chamber of Commerce and Industry at Budapest in 1890, and the name "Hunyadi" alone, without any label, in 1895, under the Hungarian statutes above referred to, and in accordance with the pro-

22 visions of the treaty between the United States of America and Austro-Hungary of June 1, 1872.

EIGHTH.—The Circuit Court decided that complainant had no exclusive right in this country, after the year 1888, to the name "Hunyadi," and denied an injunction against the name "Hunyady Lajos," but granted an injunction against the red and blue label and an accounting of damages, holding that the use of this simulated label was intentional and fraudulent in its object and in its results. It also held that the complainant was not chargeable with laches in not taking earlier measures to suppress defendant's use of the label.

23

A copy of the opinion of Judge Shipman of said Circuit Court is hereto attached and marked "Exhibit D."

NINTH.—Both parties appealed from the decree of the Circuit Court entered upon said decision to the Circuit Court of Appeals, which reversed said decree as to the label and remitted the cause with instructions to dismiss the bill with costs of the appeal.

A copy of the opinion of the Circuit Court of Appeals (two Judges only sitting) is hereto attached and marked "Exhibit E."

24

TENTH.—A petition for a rehearing was thereupon filed by petitioner in the Circuit Court of Appeals and the Court's attention called to the treaty above referred to between the United States of America and Austro-Hungary, but such petition was denied.

A copy of the opinion rendered by said Court is hereto attached and marked "Exhibit F."

The opinions of the Circuit Court and of the Circuit Court of Appeals in the suit of petitioner against the Eisner & Mendelson Company, to which reference is made in the opinions hereto attached, are fully contained in the petition for writ of *cer-*

tiorari in that case simultaneously presented by your petitioner. 25

ELEVENTH.—The decision of the Circuit Court of Appeals was rendered solely upon the supposed authority of the case of *Menendez* vs. *Holt*, 128 *U.S.*, 514, which your petitioner respectfully submits does not sustain the reasoning of the Court upon the facts which were clearly proved; and that said decision is opposed to the law which this Honorable Court has laid down in the case of *McLean* vs. *Fleming*, 96 *U. S.*, 245.

TWELFTH.—That the United States Circuit Court of Appeals committed a grievous error in overlooking or disregarding the fact that until the year 1895 your petitioner was unable to restrain in Hungary the use of the name "Hunyadi" in connection with the word "Lajos;" that consequently in the United States her right to restrain the use of that name upon waters imported from Hungary was doubtful, that petitioner did everything in her power to establish her rights in Hungary when statutory provisions made this possible and continued these efforts from 1891 until 1896, when she finally succeeded, and that among these litigations in Hungary was a suit against defendant's principal, Louis Schmidthauer. 26

THIRTEENTH.—That if the decision of the Circuit Court of Appeals is to be the law of the land, anybody can with impunity sell water from any source whatever and of any kind or quality whatever under a fraudulent imitation of your petitioner's red and blue label and with the name "Hunyadi" thereon, either alone or as a prefix to some other name; that public health is endangered thereby and the welfare of the community demands that such gross imposition upon physicians and patients alike be stopped by injunction. 27

28 FOURTEENTH.—That your petitioner has never by words or by deed abandoned her exclusive claim to the name "Hunyadi" or to her red and blue label, but is charged only with the imputed knowledge of manifold infringements and a furtherance of the same by her consignee the Appolinaris Co., which fraudulently designed to deprive your petitioner by such practices of the name "Hunyadi" for its own benefit, but has been prevented by injunction in England from carrying such fraudulent scheme to perfection.

FIFTEENTH.—That there is no "Hunyadi Spring" in existence in Hungary nowadays outside of the
29 "Hunyadi Janos" springs of your petitioner, and your petitioner's exclusive rights to the name "Hunyadi" are recognized in all civilized countries, excepting in the United States of America, where they are denied by said decision of the Circuit Court of Appeals. That such denial if sustained would practically destroy your petitioner's business in the United States established here for nearly thirty years.

SIXTEENTH.—The opinion of said Circuit Court of Appeals was rendered on the 5th day of January, 1899, and the decree of said Circuit Court of Appeals has been duly entered, and its mandate has
30 been issued.

SEVENTEENTH.—And your petitioner further represents that said decree of said Circuit Court of Appeals is final between the parties unless this Honorable Court should of its own motion direct the bringing up for review of said cause.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to

this Honorable Court, on a day certain to be therein 31
designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled "Emilie Saxlehner, Complainant-Appellant, *vs.* Alexander Nielsen, Defendant-Appellant, No. 1023," to the end that the case may be reviewed and determined by this honorable Court as provided in Section 6 of the Act of Congress entitled "An Act to Establish Circuit Courts of Appeal and to define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891; and that your petitioner may have such other or further relief in the premises as to this Court may seem appropriate 32
and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals for the Second Circuit in the said cause and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.,

EMILIE SAXLEHNER,
Petitioner,

By JOSEPH H. CHOATE, ARTHUR VON BRIESEN and ANTONIO KNAUTH,
Her Attorneys and Counsel.

Due service of the foregoing petition is hereby 33
admitted this 11th day of February, A. D. 1899.

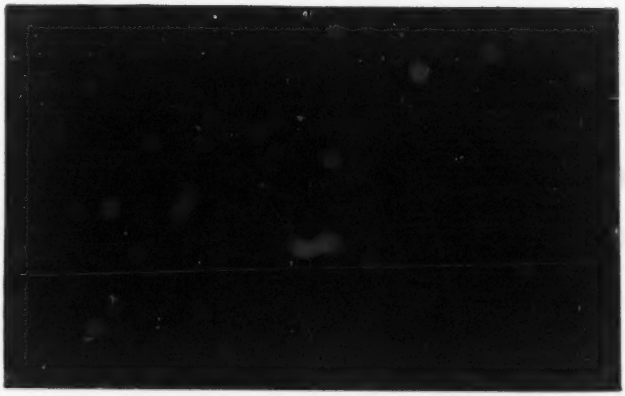
Alexander Nielsen
Defendant.
by Edward Kaufmann
his attorney
and by Louis C. Radegener
his Counsel

Complainant's Labels.

"Exhibit A."



"Exhibit B."



Defendant's Label.

"Exhibit C."

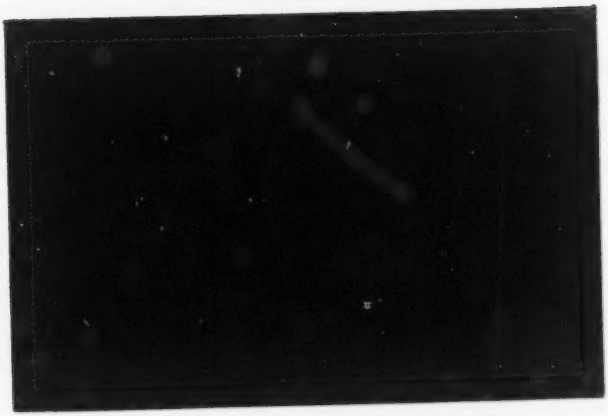


Exhibit D.

34

UNITED STATES CIRCUIT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

EMILIE SAXLEHNER

vs.

ALEXANDER NIELSEN.

35

SHIPMAN, *C. J.*—This is a bill in equity by a resident of Budapest in Hungary and a subject of the King of Hungary, against a citizen of Brooklyn and the State of New York, to enjoin him from the sale of Hungarian bitter water under the name of "Hunyadi Lajos," and in bottles bearing labels which imitate those used by the complainant in her business of selling in this country a Hungarian bitter water called Hunyadi Janos.

A similar action by the complainant against the Eisner & Mendelson Company to restrain that company from the use of the name Hunyadi Matyas, has recently been tried before me in the United States Circuit Court for the Southern District of New York, upon a full record, and the facts in regard to the history of the name Hunyadi in connection with the sale of Hungarian bitter waters, and to the history of such sales in this country, and to the exclusive right of the complainant to the name, and the conclusions of the Court are stated at length in the opinion which has just been filed and need not be formally repeated. The record in this case is much shorter and gives the Hunyadi history in a somewhat disjointed way, but the conclusion that the complainant had no exclusive right

36

37 in this country after the year 1888 to the name Hunyadi, is unaltered.

The history of the complainant's red and blue label, which has been used in this country upon the bottles of her Hunyadi Janos water, was also stated in the Eisner & Mendelson case. The firm of Bell, Pollitz & Co., of which Nielson was a member, began to import Hungarian bitter water into this country in 1892, under the name of Hunyadi Lajos, and to sell it in bottles with labels closely resembling the red and blue labels of the complainant. The water was called by that name in Hungary and the importers used the label because it was associated in the minds of the public with the
38 character and reputation of the Janos water, and because its use greatly facilitated the sale of any Hunyadi water and created for the Lajos water a market without trouble or expense. The use of this simulated label was intentional and was fraudulent in its object and in its results. It does not appear in the record when the partnership of Bell, Pollitz & Co. was dissolved and when Nielson took the business upon himself, but he continued the use of the label upon the bottles which he sold until after the commencement of this suit, when he changed the label. He was notified of the alleged infringement in October, 1896. The complainant is not chargeable with laches in not taking earlier measures to
39 suppress the defendant's use of the label.

There can be no decree against the use of the name Hunyadi. Let there be an interlocutory decree for an injunction against the infringement of the complainant's red and blue label, and an accounting of the damages to the complainant arising from the infringements since the defendant's sole ownership of the business. The question of costs will be reserved until final decree.

(Endorsed)—Opinion.—Filed June 30, 1898.

Exhibit E.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

ALEXANDER NIELSEN,
Defendant-Appellant.

Cross appeals from a decree of the Circuit Court, Southern District of New York.

Per Curiam:

The questions raised in this cause are substantially the same as in Saxlehner *vs.* Eisner & Mendelson, decided herewith. The Circuit Court held that complainant had no exclusive right in this country to the name "Hunyadi," in which conclusion we concur. The Circuit Court further granted an injunction against continued use of the red and blue labels, and an accounting for past infringements by the use of such labels. For reasons stated in the Eisner case the decree as to the labels is reversed and cause remitted with instructions to dismiss the bill, with costs of this appeal.

43 **Exhibit F.**

U. S. CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

EMILIE SAXLEHNER

vs.

EISNER & MENDELSON COMPANY.

SAME

44 vs.

SIEGEL-COOPER CO.

SAME

vs.

RUDOLPH GIES.

SAME

vs.

45 LOUIS MARQUET.

SAME

vs.

ALEXANDER NIELSEN.

Per Curiam:

We are unable to assent to the proposition that the provisions of the treaty are to be construed so

as to hold that when the public in this country has 46
acquired through the owner's laches, the right to use a trade name and a trade-mark, such right is abrogated, whenever by the operation of some subsequent Hungarian law the trade name and trade-mark is secured to him in Hungary. For that reason petition for reargument is denied.